FIRST DISTRICT APPELLATE PROJECT
730 Harrison Street, Suite 201 San Francisco, CA 94107 (415) 495-3119

August 24, 2011

DONALD SPECTER
1917 Fifth St.
Berkeley, CA 94710

RE: JOSE MORALES
Case No. A132816
DEL NORTE County Superior Court No. HCPB105015

Thank you for accepting appointment in this case. The case is designated "independent," which means that our office will not automatically be consulting with you during the preparation of the case. However, should you have any questions about the case, please consult the FDAP staff attorney named below.

Although this case is Independent, you must meet two requirements:

1. You must send our office a copy of every document you file in this case. We will be reviewing the briefs, opinion and other filings at the close of the case to update the appointments panel and determine compensation recommendations. We cannot perform those functions unless we have copies of everything.

2. You must consult with our office before filing a no-merit (Wende) brief. It is required that you call us to discuss the facts, procedures, potential issues tentatively discarded, etc., before you file a Wende brief, or in the event that you are considering advising a client to abandon an appeal for lack of an arguable issue.

Again, please feel free to call the FDAP staff attorney listed below if you have any questions.

Sincerely,

Matthew Zwerling
Executive Director

Assigned FDAP Staff Attorney:	J. BRADLEY O'CONNELL

DECLARATION OF INDIGENCE

Re: People v. **Jose Morales, A132816**

I, Wendy Bauer, declare as follows:

1. I am employed as a Case Processor at the First District Appellate Project.

2. My usual job responsibilities include examining the case files of respondents, in cases where the People of the State of California have filed a notice of appeal, in order to determine if the respondent qualifies for court-appointed counsel.

3. I have examined respondent's file in the above-referenced case, including the superior court docketing sheet and the abstract of judgment. According to these documents, respondent was represented by court-appointed counsel in the Superior Court.

I declare under penalty of perjury, under the laws of California, that the foregoing is true and correct.

Executed on August 24, 2011, at San Francisco, California.

Wendy Bauer

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF DEL NORTE

A132861

In re

JOSE MORALES,

Petitioner,

On Habeas Corpus.

Case No. HCPB 10-5015

NOTICE OF APPEAL

Judge: The Honorable Robert W. Weir

Action Filed: 1/21/2010

Respondent appeals the Order issued July 8, 2011. A copy of this order is attached.

Dated: July 22, 2011

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
JESSICA N. BLONIEN
Supervising Deputy Attorney General

AMANDA J. MURRAY
Deputy Attorney General
Attorneys for Respondent

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Attachment

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF DEL NORTE

In re JOSE MORALES, (P-63392) On Habeas Corpus	CASE NO.: HCPB 10-5015 DECISION AND ORDERS RE: HABEAS CORPUS

BACKGROUND

In December 2002, this Court, in the matter of *Escalera v. Terhune*, a habeas corpus proceeding; made findings that the California Department of Corrections, (CDC), now re-named The California Department of Corrections and Rehabilitation, (CDCR), had a policy of segregating inmates on the basis of ethnicity for extended periods of time; that such a policy was constitutionally impermissible because it was preferential on the basis of ethnicity; and that the Department's policies governing race relations resulted in a "culture of separation' which contributed to inter-racial violence.

This court ordered that the Department refrain from affording preferential treatment to inmates on the basis of ethnicity, allocate sufficient resources to manage inmates on an individual basis, rather than on the basis of ethnic groups, and to take steps to improve race relations and overcome the "culture of separation." That order remains in effect, and a copy is attached as Appendix A.

Subsequently, that order was affirmed on appeal by Division 1, of the First Appellate District. Because that opinion was not certified for publication, a copy is attached as Appendix B.

It should be noted that in the *Escalera* case, both this Court, and the Court of Appeal applied the standard of *Turner v Safley* 482 U.S. 78 (1987).

In 2006, the United States Supreme Court dealt with the matter of racial segregation in California prisons in the case of *Johnson v. California* 543 U.S. 499 (2006).

In Johnson, CDC had a policy of housing inmates only with members of their own race for up to 60 days upon their arrival at a new correctional facility. It is noteworthy that the policy was neutral, in the sense that it did not favor one race or ethnicity over another, but applied equally to separate inmates by race, and was for the purpose of preventing violence caused by racial gangs.

The Supreme Court reversed the Ninth Circuit Court of Appeals, and held that the standard of *Turner v. Safley*, did not apply, but instead, held that the proper standard was "strict scrutiny". In addition, the Court held that the strict scrutiny standard applies, even where, as in *Johnson*, the racial classification did not favor one race over another, and even where preventing racial violence is the stated reason for the policy.

The Supreme Court went on to say:

> "Indeed, by insisting that inmates be housed only with other inmates of the same race, it is possible that prison officials will breed further hostility among prisoners and reinforce racial and ethnic divisions. By perpetuating the notion that race matters most, racial segregation of inmates may exacerbate the very patterns of violence that it is said to counteract."

The Supreme Court also pointed out that virtually all other states and the Federal Government manage their prison systems without reliance on racial segregation.

Finally, after observing that public respect for our system of justice is undermined when the system discriminates based upon race, the Court stated:

> "when government officials are permitted to use race as a proxy for gang membership and violence without demonstrating a compelling

> government interest and proving that their means are narrowly tailored, society as a whole suffers."

Johnson means that this court incorrectly applied *Turner v. Safley* in deciding the *Escalera* case, when it should have applied the more stringent strict scrutiny test.

It is against this background, that the Petitioner, Jose Morales brings his petition for writ of Habeas Corpus.

THE PETITIONER

At the time of filing of the petition in this case, Jose Morales was an inmate confined in B Facility, Pelican Bay State Prison (PBSP), a general population facility, housing approximately 600 Level IV (Maximum Security) convicts. Since the filing of the petition, Mr. Morales' circumstances have changed, and he is no longer housed in the B Facility general population. However, because the issue presented by this case affects a large number of inmates, and because the issue is continuing, the Court declines to dismiss the matter on grounds of mootness.

It should be noted that at the time of filing of the petition, the petitioner, like most other inmates in B Facility, had not been validated as a member or associate of a prison gang or disruptive group under Title 15, section 3378 of the California Code of Regulations.

CONTENTIONS

The Petitioner complains that all inmates in Facility B are classified into one of five ethnic groups, and that each group may be treated differently from other inmates under what the CDCR calls a "modified program." The five groups are Black, White, Northern Hispanic, Southern Hispanic, and Others. Others include Asians, Pacific Islanders, American Indians, and anyone else who does not fit into one of the first four groups. The petitioner alleges that at any given time, all members of an ethnic group may be subjected to being locked in their cells, or denied such activities as participating in canteen, attending chapel, receiving packages, receiving visitors, and work assignments, while inmates of other ethnicities are allowed these privileges.

The Respondent does not dispute that it employs "modified programs", and that a modified program may deprive all members of one or more of the five groups of certain

privileges enjoyed by other inmates, but claims that each of the five groups is a disruptive group, or gang, rather than an ethnic group. Respondent further argues that because the groups are not ethnic groups, that it's practices should be viewed under the standard of *Turner v. Safley*, supra. Alternatively, Respondent argues that even if the five groups are considered ethnic groups, that its practices are narrowly tailored to further a compelling governmental interest, and are therefore valid under *Johnson v. California*, supra.

DISCUSSION

At the outset, it must be acknowledged that gangs and gang-related violence are a huge problem in California prisons; and the situation does not appear to have improved, since this court made its findings in the *Escalera* case, nearly a decade ago.

In the prison context, a few definitions are in order, as contained in Title 15 CCR Sec. 3000:

> "Gang" means any ongoing formal or informal organization, association or group of three or more persons which has a common name or identifying sign or symbol whose members and/or associates, individually or collectively, engage or have engaged, on behalf of that organization, association or group, in two or more acts which include, planning, organizing threatening, financing, soliciting, or committing unlawful acts or acts of misconduct classified as serious pursuant to Section 3315.
>
> "Prison gang" means any gang which originated and has its roots within the department or any other prison system.
>
> "Disruptive group" means any gang other than a prison gang.

Thus is can be seen, that when PBSP officials refer to Blacks, Whites, etc., as disruptive groups, they mean that every individual in that group is a member or associate of a gang.

Under the provisions of Title 15 CCR 3378(c) (2) and (c) (3), an inmate may be validated as either a member or an associate of a gang. In order for the CDCR to determine that an inmate is a member or associate, there must be at least three independent source items of documentation.

15 CCR 3378 (c)(8) specifies a list of thirteen possible criteria that may be used to satisfy the requirement of three independent source items.

Despite this rather clear regulatory scheme, officials at PBSP testified that very few of the over 600 inmates in B Facility have been validated as gang members or associates. Indeed, Facility Captain Bell, the administrator in charge of B Facility testified that some of the inmates in B Facility would not have enough points to validate them as members or associates of a gang.

Nevertheless, officials at PBSP have managed the whole population of B Facility on the assumption that every one of the inmates was a member or associate of one of the five disruptive groups.

It is worth pointing out that the regulations setting out strict criteria for gang validation were intended to bring a measure of due process to what had become a rather haphazard process of validating gang members and placing some of them in the Security Housing Unit for indeterminate terms on sometimes questionable information. Section 3378 was intended to improve the accuracy and fairness of the process of assigning gang labels to inmates, because those labels impact the lives of inmates in very significant ways.

In determining whether Whites, Blacks, Northern and Southern Hispanics, and Others are ethnic groups or gangs, a number of factors come into play. First, the terms are racial or ethnic by their nature, and at times during the testimony, witnesses appeared to be using the terms as referring to race. While there were a very few rare exceptions noted, each group is composed almost entirely of the ethnic group designated by the name. Third, inmates are given no choice but to be placed into one of the groups, although they are given the option of choosing which group they will be placed in (a choice that may be over-ruled by CDCR staff if they feel it is insincere). As noted, every inmate in B Facility, and, apparently, every inmate at PBSP is assigned to one of the five groups.

Although CDCR witnesses testified that inmates self-identify as members of a disruptive group, this self-identification was usually done by asking each inmate "who do you want to cell with?", and giving the inmate a choice of one of the five groups. Inmates are not, apparently,

told that they are choosing a disruptive group, but only that they have a choice of the race or ethnicity of their cellmate.

If an inmate says that he will cell with anyone, or declines to state a preference about the ethnicity of his cellmate, CDCR staff could either over-rule that, and classify the inmate as a member of whatever group they felt most accurately described the inmate's ethnicity, or, as one CDCR witness testified, if an inmate expressed no preference, staff might have a "heart to heart talk" with him; apparently to convince the inmate that being celled with a member of his own race would afford him more safety.

Evidently, inmates are classified in this manner throughout the California prison system, and not just at PBSP.

While prison officials certainly may (and should) take race and racial tensions into account in managing inmates, it appears to the Court that in this case, they have done what the Supreme Court in *Johnson* described as using race as a proxy for gang membership and violence. The Court concludes that while a great many of the inmates on B Facility might be members or associates of gangs, whether they have been validated as such or not, other inmates are not gang members or associates, and could not be validated pursuant to 15 CCR 3378, and that the primary basis for including inmates in the five categories is their race or ethnicity.

There can be no doubt that under the "modified program" inmates are given preferential treatment or greater restrictions, according to their group assignment. For example, a copy of Petitioner's Exhibit 2 is attached as Appendix C. As may be seen from the exhibit, the weekly Plan of Action for the week beginning January 7, 2010 for Facility B separated inmates according to their racial classification, which by itself, would render the plan subject to strict scrutiny under *Johnson v. California*, supra., but also afforded preference to some inmates on the basis of race and penalized others by subjecting them to greater restrictions. For example, Southern Hispanic and White inmates are denied canteen, chapel, packages, regular visiting, and work assignments. The Plan of Action for that weekly time period is typical of action plans for other weeks, as well.

This preferential treatment on the basis of race violates this court's order in the *Escalera* case. It appears that Mr. Morales filed the petition in this case because he was not a party to the *Escalera* case, and was told that he had no standing to seek relief under the existing order in that case. Therefore, in the interest of judicial economy, and to avoid a multiplicity of litigation, the Court believes that the order in this case should contain provisions allowing inmates to file motions for the enforcement of the court's orders whether they are parties to the litigation or not.

Although separate-but-equal segregation was the subject of the *Johnson* decision, this court is particularly troubled by the fact that CDCR's policy here was not equal, but preferential. In *Johnson*, the Supreme Court noted its decision 50 years earlier, in *Brown v. Board of Education*, 347 U.S. 483, rejecting the notion that separate can ever be equal or "neutral", and refused to revise it. But if racial segregation without a preference is highly suspect, preferential racial segregation must be even more so.

In this case, CDCR witnesses denied that Southern Hispanic and White inmates were being restricted from certain privileges as punishment; but when asked why those groups were being denied the privileges instead of other groups, the answer was that Southern Hispanics and Whites were the ones who had caused the problem and it would not have been fair to penalize the others. The individuals who had participated in an incident were removed from General Population, and housed in Administrative Segregation, but all other members of their ethnic group were restricted, pending investigation. So the conclusion is inescapable that regardless of whether CDCR calls it punishment, penalties are being meted out to all members of groups on the basis of the actions of a few individuals, and are being meted out unequally on the basis of race or ethnicity. It would be difficult to conjure up a scenario more likely to engender resentments between racial groups, and to harden racial divisions, than to reward or punish racial groups in a preferential manner.

There can be no doubt that prisons are dangerous places for staff and inmates alike, and accordingly, there is a compelling governmental interest in maintaining prison safety by controlling gang violence. But there are more narrowly tailored means of controlling violence than to restrict entire ethnic groups.

This court has taken judicial notice of its findings in the *Escalera* case, and the testimony of Warden McGrath, cited by the Court of Appeal, that a behavior-based, rather than a race-based approach is a suitable and effective method of managing inmate violence. Similarly, Facility Captain Bell testified that he had implemented a system of evaluating inmates based upon an individual threat assessment score, and classifying them on that basis, rather than by assigning them, wholesale, to an ethnic group for greater, or more restricted privileges. Both Captain Bell, and Associate Warden Smith testified that they saw merit in this program, but that they were ordered, in a 2009 telephone conversation by a Deputy Director, whose name they could not remember, to discontinue this system, as it was "against Department policy", with no other reason being given. (That 2009 telephone conversation appears to mark the end of CDCR's compliance with this court's *Escalera* order.) Even, in an emergency situation, a non-preferential racial separation for a very short time, as allowed by the *Escalera* ruling, might pass strict scrutiny. Finally, CDCR's own regulations, as set forth in the gang validation process in 15 CCR 3378, provide a much more narrowly tailored method of separating inmates who are prone to racially-based gang violence. Instead of these and perhaps other approaches that might be found in the prison systems of most other states and the Federal prisons, CDCR has chosen to paint with a broad brush, and their methods are not the narrowly tailored means contemplated by *Johnson v. California.*

FINDINGS

1. As they exist in B Facility at PBSP, Blacks, Whites, Northern and Southern Hispanics, and Others are ethnic groups, not disruptive groups (gangs), although among those ethnic groups many, and perhaps most, inmates are engaged in, or associated with, gang-related activities.

2. Staff at PBSP are not presently in compliance with this court's order in the *Escalera* case, because ethnic groups are being managed in a preferential manner.

3. Inmates are being classified as members or associates of disruptive groups without compliance with the validation requirements of 15 CCR 3378, and primarily on the basis of their ethnic identification. On this basis, they are subject to substantial deprivations of privileges compared to other inmates.

4. Although there is a compelling governmental interest in prison safety, CDCR has used race as a proxy for gang membership and violence, and the means employed by CDCR to serve that compelling interest in this case are not narrowly tailored.

5. The issues presented by this case are likely to recur, but because the inmate population is transient over time, inmates who are not parties to this case should be able to seek enforcement of the orders herein, in the interest of judicial economy, unless a published appellate opinion results, which would make it possible for the rulings herein to be cited.

ORDERS

1. The court reiterates its orders in the case of *Escalera v. Terhune,* attached in Appendix A. Specifically, CDCR staff at PBSP is ordered to refrain from affording preferential treatment to inmates on the basis of ethnicity. In their discretion, the respondents may lock down the prison, and may release inmates from lockdown based upon individual behavior, and upon informed predictions of individual behavior; but not on the basis of ethnicity. On a short-term emergency basis, respondents may separate inmates on the basis of ethnicity, if prison security requires it, so long as it is not done preferentially.

2. CDCR staff at Pelican Bay State Prison is ordered, within 60 days, to cease and desist from managing inmates as members or associates of disruptive groups, unless those inmates have been individually validated as members or associates pursuant to 15 CCR 3378.

3. Inmates who are not parties to this case, or to the case of *Escalera v. Terhune* may seek enforcement of the orders made herein by filing a pleading in this case.

DATED: 7/8/11

ROBERT W. WEIR

ROBERT W. WEIR
Judge of the Superior Court

FILED

DEC 10 2002

SUPERIOR COURT OF CALIFORNIA
COUNTY OF DEL NORTE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF DEL NORTE

AARON ESCALERA, K-05701

Petitioner,

Vs.

CALVIN TERHUNE and JOE McGRATH

Respondent.

CASE NO.: HCPB 00-5164

DECISIONS AND ORDERS: RE HABEAS CORPUS

In this habeas corpus petition, inmate Aaron Escalera, alleges ethnic discrimination by the Department of Corrections (CDC), against Southern Hispanics at Pelican Bay State Prison (PBSP). (Southern Hispanics, are Hispanic inmates from Southern California, with the North-South dividing line being Bakersfield, California.)

The issues presented, are:

1. Whether the Respondents have a policy of segregating inmates based upon ethnicity, and if so, whether such a policy is constitutionally permissible.

2. Whether the Respondents "locked down" all Southern Hispanic inmates in Facility A, at PBSP from May 10 – June 20, 2000, and if so, whether such an act is constitutionally permissible.

COURT'S EXHIBIT NO. 1
IDENTIFICATION/EVIDENCE
DKT.# HCPB00-5015
DATE: 4-7-11
PENGAD 800-631-6989

APPENDIX A

3. Whether CDC and PBSP policies governing race relations led to a situation where it became necessary to impose racial or ethnic segregation, in order to prevent race rioting among inmates, and if so, whether such policies are constitutionally permissible.

The general rule is that racial segregation is impermissible in prisons, Lee v. Washington, 390 U.S. 333 (1968). Prison officials, acting in good faith, and in particularized circumstances, may take into account racial tensions in maintaining security, discipline and good order, Lee, supra; Cruz v. Beto, 405 U.S. 319 (1972).

In analyzing the issues presented, it is clear at the outset, from the evidence presented, that the Respondents, at least until January 2001, have had a policy of segregating inmates based upon ethnicity, and did "lockdown" all Southern Hispanic inmates in Facility A, at PBSP from May 10 – June 20, 2000. (A "lockdown" is a situation in which inmates are confined to their cells, and not permitted out, to exercise, or to participate in programming, or other activities.)

The lockdown of Southern Hispanic inmates was preferential. That is, it was based upon the premise that members of a particular ethnic group, simply by reason of their membership in that group, were more dangerous, and posed a greater management problem than inmates of other ethnicities. A lockdown of all inmates, without regard to ethnicity, would be permissible, even over an extended period of time, if it were necessary to maintain order and institutional safety. Such a lockdown, would not raise issues of ethnic discrimination, and would not involve constitutional principles of equal protection of law. What the Court finds amiss in this situation, is that assumptions were made about the behavior of individuals, based solely upon their membership in an ethnic group, and those individuals were treated differently (and unfavorably), from other inmates who were the same in every respect, except for their ethnicity.

In addition, the court finds that although a policy change was announced by the warden at PBSP, in January 2001, that inmates would henceforth be managed on the basis of their individual behavior, rather than on the basis of the perceived behavior of their racial or ethnic group; ethnic discrimination continues to a lesser degree at PBSP, because the new policy has not been completely implemented.

It must be acknowledged that prison officials in California, and particularly at PBSP, face an exceedingly difficult task in managing inmates. The prison system has a serious problem with prison gangs, and with other disruptive groups, which are not classified as prison gangs, but which nevertheless operate within the prisons and cause enormous difficulties in maintaining a safe environment for staff and inmates alike. In addition, racism among inmates flourishes in the prison setting, and is far more pronounced in prison than in society, generally. The two problems are closely intertwined, and at times, are nearly indistinguishable.

The Respondents routinely classify each inmate into an ethnic group, such as Whites, Blacks, Northern Hispanics, (There are very few Northern Hispanic inmates at PBSP, because CDC has transferred them elsewhere), Southern Hispanics, Border Brothers (Hispanics who are foreign nationals) and Others (Asians, Pacific Islanders, American Indians, etc.), and use the classification information for management purposes. Inmates have no choice in the matter of whether they will be ethnically classified, although they may express a preference, which the Respondents may, or may not, follow, depending upon the Respondents' perception of which grouping the inmate adheres to. The ethnic groupings contain inmates of that ethnicity, but a few individuals are able to be classified under an ethnicity different from their genetic ethnicity, by virtue of being accepted into that grouping, or adhering to it. For the most part, however, the classifications are an accurate indicator of an inmate's ethnicity.

For many years, CDC has managed inmates on the basis of their ethnicity. For example, Appendix A is a portion of Exhibit 1, which outlines the schedule of yard releases for the period

June 6, - June 19, 2000 for Facility A. (Note that Southern Hispanics are not permitted yard release). This practice is longstanding, and evidence at the hearing established that similar practices were occurring at San Quentin, in 1985. Prison officials did not seem to feel that it was unusual, although some expressed the opinion that in retrospect, managing inmates in groups, based upon ethnicity, had been a mistake.

The California prison system operates under a constant threat of race riots, and much of the violence that occurs in prisons is related to race, or to the gangs that are centered on racial or ethnic groupings. The danger of inter-racial violence has led to the policies of separating races, which, in turn, have resulted in wider separations and greater potential for violence, even while short-term problems were averted. For this reason, race relations within prisons, lie at the heart of the problem, and are a large cause of the lockdowns, and other measures CDC has taken to control violence.

Prisoners have a right to live in a prison environment in which they are not discriminated against on the basis of ethnicity. CDC has an obligation to provide such an environment. Although on an emergency basis, CDC may separate inmates to avoid inter-racial violence, the Respondent may not manage race relations within the prison system in such a way as to create an emergency, and then use the emergency to justify what would otherwise be clearly unconstitutional practices.

Testimony established that CDC has maintained a "culture of separation", based upon the idea that inmates could only get along with members of their own ethnic group, and further established that such a policy has been a mistake, and that it breeds violence among inmates.

Many prison officials who testified did not express any belief that the prison system has an ability to influence the racial attitudes of prisoners, despite the round-the-clock control the prison has over the lives of inmates. When asked what CDC was doing, or could do, to improve

race relations, most of the witnesses (with the notable exception of Warden McGrath) could suggest little. There also appeared to be little recognition that officially classifying and segregating inmates on the basis of ethnicity might contribute to the problem. The Court finds that CDC's practice of managing inmates on the basis of ethnicity has contributed to racial tensions, has made inter-racial violence more likely, and has, in part, necessitated the steps CDC has taken in locking down inmates on the basis of ethnicity to prevent further violence.

To a degree, the policy change announced by Warden McGrath in January 2001 represents a departure from those practices, but full implementation of that policy change has not occurred, and many inmates, particularly Southern Hispanics like the Petitioner, will remain in lockdown for extended periods based upon their ethnicity. (The petitioner, himself, was released from lockdown, subsequent to the filing of this petition. However the Court has declined to dismiss the petition on grounds of mootness, because this is a matter likely to recur. In addition, approximately 12 other petitioners raising the same issue have agreed that their cases may await the outcome of this petition.)

Each of the major ethnic groupings includes one or more criminal organizations, which the Respondents designate as either a prison gang, or a disruptive group. (For brevity, the Court will refer to them, collectively, as gangs.) The most powerful and dangerous of these criminal organizations is a gang known as the Mexican Mafia, or "Eme", which is Southern Hispanic.

The Eme has a hierarchy, starting with a small core group of members, most of whom have been identified by the Respondents, and placed in Security Housing Units, and a substantially larger group of associates, who control Eme activities in various housing units of prisons around the state. The Eme associate in charge of a housing unit is often referred to as a "shotcaller". Below the associates, are a very large number of Southern Hispanic inmates, who will carry out the orders of the Eme, either willingly, or because of fear. The Eme engages in various criminal activities both inside and outside California prisons. These activities include

drug trafficking and other money-making activities, and also include crimes involving violence, or the threat of violence for the purpose of punishing disobedience, extortion, revenge, and the like.

It would be difficult to overstate the power of the Eme, over Southern Hispanic inmates. Testimony indicated that when a new inmate arrives at PBSP, the shotcaller of his housing unit will demand to see documents from the inmate's file, known as a 128 G, or "classification chrono", which will allow the shotcaller to make use, for gang purposes, of the CDC's own management information. The information allows the Eme to punish or control inmates. Inmates may be ordered by the Eme to attack and kill other inmates, and will be attacked and killed themselves, if they fail to comply. Some witnesses opined that if a Southern Hispanic inmate was living in a housing unit, and going onto the exercise yard without being physically attacked, it was a clear sign that he is cooperating with the Eme, because otherwise, he would not be able to avoid physical assault. Officials who testified, believed that the power of the Eme is so pervasive, that every Southern Hispanic inmate at PBSP should be considered as belonging to a disruptive group, because even if an inmate arrived at PBSP without such allegiance, he would be unable to escape being controlled by the Eme, upon arrival. This led several of the witnesses to equate Southern Hispanics per se with being members of a disruptive group, and this belief seemed to be widely held among the CDC witnesses.

The Eme is also capable of fomenting racial disturbances in order to further it's purposes, which it does from time, including a particularly large and violent riot which occurred in B Facility at PBSP on February 23, 2000. That riot led to the lockdown which prompted the petition in this case.

The riot began with a planned attack by a group of Southern Hispanic inmates upon Black inmates. While the riot occurred in B Facility, it was apparently intended to begin simultaneously on A Facility as well, but for whatever reason, A Facility inmates did not riot.

The immediate response of the prison administration was to lock down both A, and B Facilities, and subsequently, to begin allowing some inmates to go to the yard based upon ethnicity (although not Southern Hispanics). This applied to both B Facility, where the riot occurred, and to A Facility, where the Petitioner was housed.

The lockdown has continued in some form, from the date of the riot, until the date of trial, two years and eight months later. During that time, inmates have paroled, and have transferred in and out of PBSP from other prisons. New arrivals would also be subject to the lockdown, even though they had not been present in PBSP at the time of the riot. This was justified by prison officials on the basis that "group politics" still made it likely that the new arrivals would commit acts of violence on the basis of their ethnic affiliation.

In January of 2000, Warden McGrath announced a new policy concerning the lockdown, which was, in effect, to begin releasing inmates from the lockdown who appeared willing to refrain from participating in gang-related activities.
The process requires a careful review of each inmate, in order to separate disruptive inmates from others, who are willing to abide by institution rules, and avoid violence. The process is made difficult by the fact that such reviews are labor-intensive, and require a degree of specialized training and experience by the reviewers. There is apparently a shortage of such staff at PBSP.

CDC officials have pointed out that it would be irresponsible to simply release inmates to the yard, knowing that racial tensions, exacerbated by the influence of gangs, still exist. It is quite likely that an uncontrolled release from lockdown would result in further rioting, and likely in fatalities among inmates or staff. It may be necessary, in the immediate aftermath of a prison race riot, to separate racial groups, until disruptive individuals can be identified and isolated. This may result in a temporary period of racial segregation, which would seem to be Constitutionally permissible, as contemplated by Lee v. Washington, and Cruz v. Beto, supra.

However, after two years, eight months, the situation can no longer be considered an emergency, but rather, the routine way things are done. Inmates have been transferred into PBSP by CDC, with the knowledge that they would be locked down under a system that relied upon ethnic discrimination, and inmates have waited months or years in a lockdown that relied upon ethnic classification for an administrative determination of whether they could be released to the yard to program like other inmates.

In January 2001, Warden McGrath announced his new policy of classifying inmates based upon individual behavior, rather than ethnic grouping. Appendix B, which was Exhibit 3, at the hearing, outlines the new policy. Despite this laudable change of policy, hundreds of inmates remain locked down, and Southern Hispanics are heavily over-represented among them. This is apparently because not enough resources have been provided by CDC to PBSP to evaluate and classify the inmates who are locked down, to separate those who are willing to program without violence, from those who are not. Because the lockdown is still based, in part, on ethnic classification, and because the lockdown has lasted for a period of time longer than that which can reasonably be considered an emergency, the Court finds that the failure to apply sufficient resources to the classification process constitutes deliberate indifference to the constitutional rights of Southern Hispanic inmates.

Further, CDC's policy of locking down inmates on the basis of ethnicity does not meet the standards of Turner v. Safley 482 U.S. 78 (1987), because a ready alternative exists, which is to release inmates from lockdown on the basis of their individual case factors and behavior, rather than on the basis of ethnicity. As noted above, prison officials may lockdown the entire prison population without discriminating on the basis of ethnicity. Safety considerations are therefore met, and the process of releasing inmates from lockdown based upon individual behavior may proceed without preferring one ethnicity over another, without unduly impacting staff, other inmates, or the allocation of prison resources.

The Court concludes, based upon the evidence at the hearing, that:

1. Respondents do have a policy of segregating inmates based upon ethnicity, and although such a policy is constitutionally permissible on a short-term emergency basis, Respondents have exceeded the time that may reasonably be considered a short-term emergency.

2. Respondents did lockdown all Facility A Southern Hispanic inmates at PBSP, from May 10 – June 20, 2000, and such action was constitutionally impermissible, because it was preferential on the basis of ethnicity.

3. Respondents' policies governing race relations resulted in a "culture of separation", which contributed to inter-racial violence, creating a situation where it became necessary to impose segregation to stop the violence; and the establishment of the "culture of separation" constituted deliberate indifference to the constitutional right of inmates to live in an environment free of ethnic discrimination.

In formulating an order to alleviate the situation, the Court is mindful of the complexity of the matter, the drastic and possibly lethal consequences of mistakes. The Court also is aware of the need for expertise in matters of penology which the respondents possess. Therefore, in part, the order of the Court will call upon the Respondents to devise the solution.

The Court makes the following orders:

1. The respondents shall refrain from affording preferential treatment to inmates on the basis of ethnicity. In their discretion, the respondents may lockdown the prison, and may release inmates from lockdown based upon individual behavior, and upon informed predictions of individual behavior; but not on the basis of ethnicity. On a short-term

emergency basis, respondents may separate inmates on the basis of ethnicity, if prison security requires it, so long as it is not done preferentially. Within 90 days of the date of this order, the respondents shall submit to the Court, in writing, a plan to implement the foregoing order.

2. Respondents shall allocate sufficient resources to promptly complete the evaluation of inmates who remain on lockdown as a result of the February 23, 2000 riot, to determine, on an individual basis, and without ethnic preference, which inmates may safely be released from lockdown, and which should be placed in the Security Housing Unit. Respondents shall report to the Court, in writing, within 90 days of the date of this order, a description of the resources so allocated, the number of inmates remaining in lockdown as a result of the February 23, 2000 riot, and the estimated date of completion.

3. Respondents shall prepare a plan to improve race relations among inmates, and to overcome the "culture of separation" so as to reduce the likelihood of ethnic violence within PBSP. The plan shall be submitted to the Court, in writing, within 120 days of the date of this order.

The Court reserves jurisdiction to make further orders to implement the decision herein.

December 10, 2002

ROBERT W. WEIR
Judge of the Superior Court

State of California

Memorandum

Date : June 1, 2000

To : All Staff and Inmates
Facility A
General Population

From : Department of Corrections
Pelican Bay State Prison, P.O. Box 7000, Crescent City, CA 95532-7000

Subject : YARD RELEASE UPDATE

Effective June 6, 2000, through June 19, 2000, Facility A will release inmates to the yard in two (2) separate groups, Blacks one day; and Whites, Others and Border Brothers the next day. *Southern Hispanics locked down and on escort/handcuff status due to reoccurring incidents.* There will be job assignments in Satellite Kitchens, Law Library, Chapel, and Program Office by race on the day they have yard *only*. Program will resume Law Library, Medical, R&R, Canteen and any other activity on their assigned yard days *only*. Telephone calls will be ran after the evening shower program of assigned yard days *only*. To complete this, it will take a concerted effort on all the inmates in the units. Yard will run as follows:

Tuesday, June 6, 2000	
AM Yard 0900 to 1100	PM Yard 1300 to 1430
Whites, Others & Border Brothers only, Even buildings (4, 6, 8)	Whites, Other & Border Brothers only, Odd buildings (3, 5, 7)

Wednesday, June 7, 2000	
AM Yard 0900 to 1100	PM Yard 1300 to 1430
Blacks only, Odd buildings (3, 5, 7)	Blacks only, Even buildings (4, 6, 8)

Thursday, June 8, 2000	
AM Yard 0900 to 1100	PM Yard 1300 to 1430
Whites, Others & Border Brothers only, Odd buildings (3, 5, 7)	Whites, Other & Border Brothers only, Even buildings (4, 6, 8)

Friday, June 9, 2000	
AM Yard 0900 to 1100	PM Yard 1300 to 1430
Blacks only, Even buildings (4, 6, 8)	Blacks only, Odd buildings (3, 5, 7)

Saturday, June 10, 2000	
AM Yard 0900 to 1100	PM Yard 1300 to 1430
Whites, Others & Border Brothers only, Even buildings (4, 6, 8)	Whites, Other & Border Brothers only, Odd buildings (3, 5, 7)

Appendix A

The Bulletin

Warden's Corner

What Lies Ahead

Over the past couple of years we have lived through a lot at Pelican Bay State Prison. We have survived violence, crisis, and unrest among the inmate population. Sometimes it seems like a lost eternity since we enjoyed a day of peaceful programming on the General Population yards. So where do we go from here?

We have always viewed our inmates in the terms of how they have defined themselves, i.e., Whites, Blacks, Northern Hispanics, Southern Hispanics, Others, etc. I think this is a mistake. We have tried many variations of segregated group programs, only to find that politics change and factionalism is a fluid monster. The groups that got along last week are at war this week, and so on.

I suggest a much more simple approach. We need to recognize only two groups of inmates; those who are motivated to program without violence, and those who aren't; those who want to do their "own time" and those who are committed to factional unity.

In identifying the inmates who want to program without violence, we need to clearly set the expectation for all inmates that they have a choice to make. If their choice is loyalty to the faction, our response will be segregation and isolation.. If their choice is to do their "own time" and program without factional violence, the opportunity will be provided for the best General Population program we can offer in a Level IV setting.

We have started this process with the advent of the "workers' buildings." We will continue to identify inmates who deserve a chance to prove their sincere desire to do a positive program. The process will be slow and deliberate to avoid a serious mistake, but eventually we will give every deserving inmate an opportunity to do his own time.

In all we do there is risk. I believe our current approach has a positive risk/reward ratio. I am asking all concerned to join me in doing everything in our power to make this new approach a success no matter how many or how few inmates choose the path to a positive program. Either way, I cannot make it happen without you.

JOE MCGRATH
Warden

Appendix B

COURT OF APPEAL, FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 1

FILED

APR 15 2004

SUPERIOR COURT OF CALIFORNIA
COUNTY OF DEL NORTE

Office of the County Clerk
Del Norte County Superior Court
450 "H" Street - Room 182
Crescent City, CA 95531

In re AARON ESCALERA, On Habeas Corpus.

A101614
Del Norte County No. HCPB005164

* * REMITTITUR * *

I, Ron D. Barrow, Clerk of the Court of Appeal of the State of California, for the First Appellate District, do hereby certify that the attached is a true and correct copy of the original opinion or decision entered in the above-entitled cause on February 10, 2004 and that this opinion has now become final.

___Appellant ___Respondent to recover costs
___Each party to bear own costs
_✓_Costs are not awarded in this proceeding
___See decision for costs determination

APR 13 2004

Witness my hand and the Seal of the Court affixed at my office this

Very truly yours,
Ron D. Barrow
Clerk of the Court

Deputy Clerk

P.O. Report:
Marsden Transcript: Sealed 1 trs.
Boxed Transcripts: ___
Exhibits: ✓
None of the above: ___

COURT'S
EXHIBIT NO. 2
IDENTIFICATION/EVIDENCE
DKT.# HCPB10-5045
DATE Voided 4-7-11

PEHGAD 800-631-6989

reml

APPENDIX B

COPY

Filed 2/10/04

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

AARON ESCALERA,

Plaintiff and Respondent,

v.

CALVIN TERHUNE et al.,

Defendants and Appellants.

A101614

(Del Norte County
Super. Ct. No. HCPB 00-5164)

Pelican Bay State Prison inmate Aaron Escalera filed a habeas petition alleging that the prison's policy of keeping Hispanic inmates on lockdown following a prison race riot in 2000 was unconstitutional. The trial court agreed, and ordered appellants, the former director of the California Department of Corrections (CDC) and the warden of Pelican Bay, to end the preferential lockdown of Southern Hispanic inmates. We affirm the trial court's orders.

BACKGROUND

Escalera has been housed as a general population inmate in Facility A at Pelican Bay State Prison (PBSP) since November 1999. The general population is where PBSP houses inmates who are eligible to participate in the prison's work or school programs and can live in the general population without violence. Inmates who have committed crimes while in prison are segregated from the general population and placed in PBSP's Security Housing Unit (SHU) until they have served out their SHU terms. Escalera has been free of violence while at PBSP and is in the highest privilege group at the prison, eligible to participate in a full-time work program.

The California prison system must grapple daily with the serious problems caused by prison gangs and other disruptive groups that operate within its facilities. The problem of disruptive gangs and groups is closely intertwined with racial identification and intergroup racism among inmates, which is far more pronounced among prisoners than in society generally. In order to maintain the safest possible environment for staff and inmates, and to minimize the potential for racially-motivated violence, prison officials have long utilized systems for classifying inmates according to their ethnic group. PBSP routinely classifies inmates as "Whites," "Blacks," "Southern Hispanics" (Hispanics from Southern California), "Northern Hispanics" (few of whom are at PBSP), "Border Brothers" (Hispanics who are foreign nationals), or "Others" (Asians, Pacific Islanders, American Indians, and others). Inmates may express a preference for which group they identify with, but they have no choice as to *whether* they will be classified in ethnic terms for prison management purposes. At PBSP and other state prisons, ethnic group classifications are routinely used to manage cellmate assignments and schedule inmate yard releases, among other matters. Escalera is classified as a Southern Hispanic.

The record reflects that each of the major ethnic groupings within the prison system has close links with one or more criminal organizations that operate within and outside prison walls. One of the most powerful of these organizations is the Mexican Mafia, or "Eme," which is Southern Hispanic. At higher security facilities such as PBSP, where gang influence tends to be greatest, inmates are under intense pressure to cooperate with Eme, and engage in prison crimes and violence. Inmates may be ordered to attack and kill other inmates, and are subject to being attacked or killed themselves if they fail to comply. It is widely believed by PBSP personnel that every Southern Hispanic inmate at PBSP who can go into the exercise yard without being attacked should be considered to be under the control of Eme because, otherwise, the inmate would not be able to avoid physical assault.

In October 1999, after a series of racial incidents between Black and White inmates, PBSP administrators declared a state of emergency at the prison. In a state of emergency, the normal procedures and time frames for placing inmates in administrative

segregation or taking other disciplinary actions are suspended so that prison officials can act more quickly in response to events. The prison remained on state-of-emergency status at the time of the trial court hearings in this action in October 2002.

On February 23, 2000, a riot occurred on the Facility B general population yard in which approximately 140 Southern Hispanic inmates attacked a similar number of Black inmates, apparently under a prearranged plan. Although there had been prior incidents between individual inmates from these groups, prison officials had not foreseen the magnitude of the intergroup violence that erupted on that date. Seventeen inmates were shot by prison guards during the riot, one fatally. Escalera was not involved in it nor was he on the B yard at any time before, during, or after the riot. However, the prison administration responded to the riot by locking down the general population of both Facility B, where the riot occurred, and Facility A, where Escalera was housed. There were apparently indications that a riot had been planned but failed to materialize on the Facility A yard. The entire general population of both units was placed on full lockdown for one month after the riot.

During a full lockdown, the inmates are confined to their cells and not permitted out to exercise and participate in programming and other activities. Starting one month after the February 2000 riot, PBSP began allowing some inmates out for periodic exercise based on their ethnic group. Facility A inmates, including Southern Hispanics, were allowed into the yard on a rotating basis, segregated by ethnic group. However, after an incident in the yard, Southern Hispanic inmates in Facility A were kept on full lockdown from May 10 to June 20, 2000. In Facility B, Black and White inmates were allowed on the yard on alternating days beginning in July 2000, but Southern Hispanic inmates of Facility B were not allowed out on the main yard until the following month. Southern Hispanics were kept on a more restrictive lockdown than other ethnic groups because they were viewed as being more tight-knit, organized, and dangerous than the other inmates.

Escalera filed a petition for writ of habeas corpus in October 2000, asserting that he had been deprived of outdoor exercise and program activities on the racially motivated

ground that he is Hispanic. In January 2001, PBSP Warden Joe McGrath announced a change in prison policy from managing inmates based on their ethnic affiliation to evaluating each inmate based on their motivation as individuals to participate in programs without violence, and to "do their 'own time' " rather than maintain factional loyalty. However, at the time of the evidentiary hearing in this action, nearly two years after PBSP's change of policy, hundreds of inmates remained in lockdown, of which the majority were Southern Hispanics. In Facility B, approximately 55 percent of those in lockdown as of October 2002 were Hispanics, compared to a 40 percent Hispanic inmate population in that facility. Hispanics were similarly overrepresented among the inmates who remained locked down in Facility A. According to Warden McGrath, the new policy of individualized assessment has not been fully implemented because there is a shortage of personnel at PBSP with the specialized training required to review each inmate's suitability for integrated programming.

Escalera's petition was consolidated with similar petitions filed by other Southern Hispanic inmates. The superior court issued an order to show cause and ordered an evidentiary hearing on the following issues: (1) whether appellants have a policy of segregating inmates based on ethnicity, and if so, whether such policy is constitutionally permissible; (2) whether appellants "locked down" all Southern Hispanic inmates in Facility A at PBSP from May 10 to June 20, 2000, and if so, whether such an act is constitutionally permissible; and (3) whether CDC and PBSP policies governing race relations led to a situation where it became necessary to impose racial or ethnic segregation, in order to prevent race rioting among inmates, and if so, whether such policies are constitutionally permissible.

Following the evidentiary hearing, the court held that: "1. [appellants] . . . have a policy of segregating inmates based upon ethnicity, and although such a policy is constitutionally permissible on a short-term emergency basis, [appellants] have exceeded the time that may reasonably be considered a short-term emergency[;] [¶] 2. [appellants] did lockdown all Facility A Southern Hispanic inmates at PBSP, from May 10–June 20, 2000, and such action was constitutionally impermissible, because it was preferential on

the basis of ethnicity[;] [¶] 3. [appellants'] policies governing race relations resulted in a 'culture of separation,' which contributed to inter-racial violence, creating a situation where it became necessary to impose segregation to stop the violence; and the establishment of the 'culture of separation' constituted deliberate indifference to the constitutional right of inmates to live in an environment free of ethnic discrimination."

The trial court ordered appellants to take the following steps to develop and implement plans to promptly eliminate the existing discriminatory treatment of inmates and avoid any recurrence of the discriminatory actions taken after the riot in 2000:

(1) "[R]efrain from affording preferential treatment to inmates on the basis of ethnicity. In their discretion, the [appellants] may lockdown the prison, and may release inmates from lockdown based upon individual behavior, and upon informed predictions of individual behavior; but not on the basis of ethnicity. On a short-term emergency basis, [appellants] may separate inmates on the basis of ethnicity, if prison security requires it, so long as it is not done preferentially. Within 90 days of the date of this order, the [appellants] shall submit to the Court, in writing, a plan to implement the foregoing order";

(2) "[A]llocate sufficient resources to promptly complete the evaluation of inmates who remain on lockdown as a result of the February 23, 2000 riot, to determine, on an individual basis, and without ethnic preference, which inmates may safely be released from lockdown, and which should be placed in the Security Housing Unit. [Appellants] shall report to the Court, in writing, within 90 days of the date of this order, a description of the resources so allocated, the number of inmates remaining in lockdown as a result of the February 23, 2000 riot, and the estimated date of completion";

(3) "[P]repare a plan to improve race relations among inmates, and to overcome the 'culture of separation' so as to reduce the likelihood of ethnic violence within PBSP. . . . [to] be submitted to the Court in writing, within 120 days of the date of this order."

Appellants timely appealed from the court's order pursuant to Penal Code section 1507. We stayed the order pending consideration of this appeal.

DISCUSSION

Appellants' primary contention is that the trial court employed the wrong legal standard in evaluating PBSP's lockdown policy. According to appellants, the court looked to whether the lockdown policy was *necessary* rather than determining whether it served a *legitimate penological interest*. Because the material facts are not in dispute, we independently review whether the trial court properly applied the law to the undisputed facts. (*In re Crow* (1971) 4 Cal.3d 613, 622; *In re Hamm* (1982) 133 Cal.App.3d 60, 65.)

Prisoners are protected under the Equal Protection Clause of the Fourteenth Amendment from invidious discrimination based on race. (*Lee v. Washington* (1968) 390 U.S. 333.) However, an inmate's right to be free of discriminatory classification, like other inmate constitutional rights, is not absolute. "[R]acial segregation, which is unconstitutional outside prisons, is unconstitutional within prisons, save for 'the necessities of prison security and discipline.' " (*Cruz v. Beto* (1972) 405 U.S. 319, 321.) A prison regulation that impinges on inmates' constitutional rights will be upheld if it is reasonably related to "legitimate penological interests." (*Turner v. Safley* (1987) 482 U.S. 78, 89 (*Turner*).) Nonetheless, as one appellate panel has cautioned, "[t]he perniciousness of a race-based classification is not lessened simply because we afford more leeway to prison officials in the operation of their facilities, and legitimate penological interests which will be served by race-based classifications will surely be few." (*Morrison v. Garraghty* (4th Cir. 2001) 239 F.3d 648, 656.)

There is no dispute here that prison authorities "have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." (*Lee v. Washington*, *supra*, 390 U.S. at p. 334.) The issue presented in this case is whether the circumstances that existed at PBSP after the 2000 riot justified prison authorities in singling out one group of inmates for extended lockdown on the basis of their ethnicity, while all other general population inmates were granted greater privileges.

As both sides recognize, *Turner*, *supra*, establishes the controlling standard of review for inmates' constitutional claims. Under *Turner*, the issue is whether a prison

regulation that burdens a fundamental right is " 'reasonably related' " to legitimate penological objectives or represents an " 'exaggerated response' " to those concerns. (*Turner, supra*, 482 U.S. at p. 87.) In determining whether a prison policy is "reasonably related" to legitimate penological objectives, *Turner* emphasizes four relevant factors: (1) whether there is a valid, rational connection between the policy and the penological interest; (2) whether an alternative means of exercising the right remains open to prison inmates; (3) the impact accommodation of the asserted right will have on guards, other inmates, and the allocation of prison resources; and (4) the absence of ready alternatives that fully accommodate the prisoner's rights at de minimis cost to valid penological interests. (*Id.* at pp. 89–91.)

Appellants assert that the superior court improperly focused its analysis on whether the discriminatory lockdown of Southern Hispanic inmates was "necessary" to a valid penological objective. In support of this proposition, appellants cite a single sentence from the court's decision: "A lockdown of all inmates, without regard to ethnicity, would be permissible, even over an extended period of time, if it were *necessary* to maintain order and institutional safety." (Italics added.) On its face, the sentence addresses a hypothetical, non-discriminatory lockdown of all inmates. It does not purport to describe any legal standard applicable to determining when a racially discriminatory lockdown might be justified, much less the standard the superior court believed it was applying in this case. The court's use of the word "necessary" in this one sentence of its 10-page opinion falls far short of demonstrating the application of an erroneous legal standard.

Appellants further maintain that the court only applied one of the four prongs of the *Turner* test, namely, whether there was a ready alternative to racial discrimination, and that it reached an erroneous conclusion on that prong. Again, we believe appellants are misreading the court's decision. In the paragraph of its decision discussing *Turner*, the trial court in fact refers explicitly to *two* of the four *Turner* factors, the availability of a ready alternative and the impact on staff, other inmates, and prison resources of

accommodating an inmate's asserted constitutional rights.[1] The two remaining *Turner* factors—whether the policy is rationally related to a legitimate objective and whether affected inmates have other means open to exercise their rights—were fully considered elsewhere in the decision, and were for all practical purposes uncontested.

The evidence clearly demonstrated a rational basis for the PBSP's policies. The court acknowledged that prison gangs and intergroup racism "cause enormous difficulties in maintaining a safe environment for staff and inmates alike," and never questions the penological importance and validity of trying to insure prison safety. There was also ample evidence in the record, none of it discounted or ignored by the trial court, that Southern Hispanic gangs present special risks due to their willingness and ability to intimidate Hispanic inmates into group loyalty. Indeed, the court stated specifically that "[i]t would be difficult to overstate the power of the EME, over Southern Hispanic inmates." Thus, it certainly cannot be said on this record, and the trial court in no way suggested that PBSP's actions were wholly arbitrary or irrational. Had the trial court found them so, that would have ended its inquiry under *Turner* and Escalera would have prevailed on that ground alone. (See *Prison Legal News v. Cook* (9th Cir. 2001) 238 F.3d 1145, 1151 [unless regulation is rationally related to a legitimate penological objective, the other *Turner* factors need not be considered].)

Second, the record amply demonstrated that the constitutional right of Southern Hispanic inmates to be free of racial discrimination could not be exercised by any alternative means while they were kept under lockdown. Appellants argue that "inmates

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[1] The paragraph reads in relevant part as follows: "CDC's policy of locking down inmates on the basis of ethnicity does not meet the standards of [*Turner*], because *a ready alternative exists, which is to release inmates from lockdown on the basis of their individual case factors and behavior, rather than on the basis of ethnicity.* As noted above, prison officials may lockdown the entire prison population without discriminating on the basis of ethnicity. Safety considerations are therefore met, and the process of releasing inmates from lockdown based upon individual behavior may proceed without preferring one ethnicity over another, *without unduly impacting staff, other inmates, or the allocation of prison resources.*" (Italics added.)

have alternative means of exercising the affected right" because some rights such as medical care and visitation continued to be provided without regard to race. However, the record conclusively demonstrates that Hispanic inmates on lockdown at PBSP suffer substantial deprivations that other general population inmates are spared.

Warden McGrath admitted that inmates on lockdown get one or two hours of outdoor exercise per week, which is less than SHU inmates receive. Inmates on lockdown are also deprived of work and school alternatives available to other inmates, and their visitation is limited to non-contact visits. There is no question that PBSP's past policy of maintaining Southern Hispanic inmates under preferential lockdown, and its failure to complete an individualized review of each inmate, violates these inmates' constitutional right to be free of discrimination and that the inmates have no alternative means of exercising that right. As the trial court expressly recognized, a lockdown of all inmates without regard to ethnicity would not be constitutionally suspect if necessary to maintain order and safety, but a preferential lockdown, placing some prisoners under greater restrictions than others based solely on their ethnicity, cannot be excused merely because the disfavored group is not stripped of every last privilege available to other inmates.

Thus, on the record before the trial court, two of the four *Turner* factors did not present any complexity. There was clearly a rational basis for the PBSP's preferential lockdown policy but, equally clear, such a policy was unavoidably discriminatory. In this posture of the case, the trial court properly focused its analysis on the two factors mentioned in *Turner* that are most germane to deciding this case: (1) whether there was a "ready alternative" to the prison's discriminatory policies and (2) whether requiring adoption of that alternative would so adversely impact staff, other inmates, and the allocation of prison resources generally, that it would be better to defer to the discretion of prison officials. (*Turner, supra*, 482 U.S. at pp. 90–91.)

In one sense, appellants have already answered these questions by their own actions. PBSP officially abandoned the policy of segregating inmates on the basis of ethnicity in January 2001. As Warden McGrath explained, the historical practice of

segregating inmates based on their race or ethnicity, what he referred to as the prison's "separation culture," had turned out to be "bad for the operation of the prison" and a "terrible mistake." According to McGrath, that culture "breeds violence" by promoting the inmates' own tendencies to self-identify as part of a group that defines its own rules and claims its own turf in opposition to other groups.

In announcing PBSP's abandonment of this separation policy to staff and inmates in 2001, Warden McGrath described the alternative in pertinent part as follows: "I suggest a much more simple approach. We need to recognize only two groups of inmates; those who are motivated to program without violence, and those who aren't; those who want to do their 'own time' and those who are committed to factional unity." At the hearing in this case, Warden McGrath testified that the "more simple approach" instituted in 2001 was working, that at least 65 percent of the general population was out of lockdown and programming with other inmates, and that PBSP had more inmates programming than any maximum security prison in the state.

In *Turner*, the Supreme Court rejected a rule subjecting prison regulations to strict scrutiny in favor of the more deferential, reasonable relationship test. The Court cautioned that a flexible standard was necessary if " 'prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations.' " (*Turner*, *supra*, 482 U.S. at p. 89, quoting *Jones v. North Carolina Prisoners' Union* (1977) 433 U.S. 119 at p. 128.) In the unusual circumstances of this case, the "difficult judgments" have already been made by prison administrators. The only new element added by the trial court's order was expedition—that prison officials must allocate the resources necessary to *promptly* complete implementation of their own chosen policy.

In our view, the record fully supports this requirement. Southern Hispanic inmates have been in lockdown for nearly four years. Three years have passed since PBSP declared the policy of managing inmates by race a failure. Although appellants assert that promptly completing the assessment of inmates still on lockdown would be "costly in money and resources," they point to no evidence in the record showing the magnitude of such costs. The test under *Turner* is not whether a policy protecting inmate rights

carries a de minimis dollar cost, but whether its costs are so significant that requiring its implementation would have more than a de minimis effect on other legitimate penological interests. (*Turner, supra*, 482 U.S. at p. 91.) We find no evidence in the record that allocating the resources necessary to end PBSP's discriminatory policies against Southern Hispanic inmates would have such an effect.

Further, the trial court's order imposes no rigid formula or timetable for PBSP to bring itself into compliance. Consistent with the court's findings and subject to its oversight, the order affords PBSP the flexibility to propose its own implementation plans and timetable. Thus, the PBSP administration is being ordered to work with the trial court to find the most practicable way of expediting the accomplishment of its own stated objectives. This surely does not transgress the limits on judicial oversight of prisons set by *Turner*.

The trial court's decision is supported by the evidence and consistent with the applicable law.

DISPOSITION

The orders appealed from are affirmed.[2]

[2] The stay previously imposed shall remain in effect until this opinion becomes final as to this court. (Cal. Rules of Court, rule 24(b)(1).)

FACILITY B Buildings 4, 5, 6, 7, & 8
PROGRAM ADJUSTMENT
EFFECTIVE: Tuesday, 2/10 through January 14, 2009

PLAN OF ACTION

ACTIVITY:	WHAT TO DO:
INMATE MOVEMENT:	**Bar-straps will remain on cells that <u>are not scheduled</u> for program and on all cells during non-program hours.** **All movement OUTSIDE the Housing Units will be under the constant and direct observation of staff.** **All Facility B Housing Unit inmates that are being escorted, restrained or unrestrained, will be announced by radio/intercom and under observation by the Housing Unit Control Officer and/or Yard Observation Officer.** **All Northern and Southern Hispanic and Black and White inmates shall be separated until further notice. Mexican National (Border Brother) movement shall be conducted with the Southern Hispanic inmate population.** **Scheduling of inmate program will be done by compatible group on the following timetable.** Black and Northern Hispanic inmates odd days of the month White and Southern Hispanic inmates even days of the month
CANTEEN:	None for South and White Normal for remaining population
CHAPEL/SWEAT LODGE:	Normal Black, Northern Hispanic and Others In cell religious study upon request South and White
CONCRETE YARD:	NONE
DAY ROOM:	NONE
EDUCATION:	In Cell Study only
FEEDING:	Normal in cell feeding
LAUNDRY EXCHANGE:	Determined by supervisory staff Only two inmates at a time on the roadway participating in Laundry Exchange
LAW LIBRARY:	PLU/GLU only as dictated by supervisory staff and separated per inmate movement section.
MAIN YARD:	Per unlock plan
MEDICAL, DENTAL & PSYCHIATRIC SERVICES:	All Northern and Southern Hispanic inmates separated. All White and Black inmates separated. (See Movement Section) All appointments filled on a one for one inmate exchange in appointment area.
R & R - PACKAGES:	None for South and White Normal for remaining population
SHOWERS:	One cell at a time unrestrained. Staff will provide a security check ensuring that the showers are secure prior to any further escorted movement during shower program.
TELEPHONES:	Normal-one cell at a time upon completion of shower program.
VISITING (FAMILY):	Normal.
VISITING (REGULAR)	Normal Black North & Others (None for South and White)
WORK ASSIGNMENTS:	Determined by supervisory staff. (None for South and White)
VOCATIONAL:	NONE

Original Signed By:

R. K. BELL
Facility B Captain

PETITIONER'S EXHIBIT 2 HEOB: 10-5015 11-4-11

APPENDIX C

PROOF OF SERVICE BY MAIL (1013a, 2015.5 C.C.P.)

I am a citizen of the United States and a resident of the County of Del Norte. I am over the age of eighteen years and am not a party to the entitled action; my business address is 450 H Street, Crescent City, Calif. 95531

On July 8, 2011 I served a copy of the DECISION AND ORDER RE: HABEAS CORPUS filed July 8, 2011 by depositing a true copy in the United State Mail in Crescent City, California in a sealed envelope with postage paid, addressed as follows:

Scott Hoxeng, Esq
[Courthouse Mailbox 9]

Office of the Attorney General
Attn: Amanda Murray
455 Golden Gate Ave., Suite 11000
San Francisco, Ca 94102

I certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge and that it was executed at Crescent City, California this date.

Dated: July 8, 2011

J Reynolds

Judy Reynolds
Judicial Assistant

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **In re Morales**

No.: **HCPB 10-5015**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On July 25, 2011, I served the attached:

NOTICE OF APPEAL

by placing a true copy thereof enclosed in a sealed envelope with the **GSO (Golden State Overnight)**, addressed as follows:

Scott Hoxeng, Esq.
250 Leavitt Mall
Crescent City, CA 95531
(Attorney for Petitioner Jose Luis Morales, P-63392)

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 25, 2011, at San Francisco, California.

L. Santos
Declarant

Signature

SF2010400657
20494631.doc

FILED

JUL 26 2011

SUPERIOR COURT OF CALIFORNIA
COUNTY OF DEL NORTE

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF DEL NORTE

IN RE:

JOSE MORALES (P-63392),
Petitioner,

On Habeas Corpus.

CLERK'S NOTICE OF FILING
NOTICE OF APPEAL

CASE NO.: HCPB10-5015

NOTICE IS HEREBY GIVEN that in the above entitled action a **NOTICE OF APPEAL** was filed on July 26, 2011 by Respondent.

NOTICES MAILED TO:

First Appellate District
Court of Appeal
350 McAllister Street
San Francisco, CA 94102

Litigation Coordinator
C/O Pelican Bay State Prison
P.O. Box 7500
Crescent City, CA 95531

Jose Morales, P-63392
C/O Pelican Bay State Prison
P.O. BOX 7500
Crescent City, CA 95532

Amanda J. Murray
Deputy Attorney General
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102-7004

Scott Hoxeng
Attorney at Law
[Courthouse Mailbox #9]

SANDRA LINDERMAN
CLERK OF THE COURT

BY: _____
E. Esparza
Deputy Clerk

RECEIVED
JUL 29 2011
Court of Appeal First Appellate District
By